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No. 07-1523

IN THE

Supreme Court of the United States

DERRICK TODD LEE,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

On Petition for a Writ of Certiorari to the Louisiana Court of Appeal, First Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The State does not dispute that the question whether it may secure felony convictions through nonunanimous jury verdicts is an exceptionally important constitutional issue that arises frequently in its courts, as well as in Oregon's. Nor does the State contest that this case presents an ideal vehicle to resolve the issue.

The only argument the State offers for denying certiorari is that this Court should give *stare decisis* effect to its deeply fractured decision in *Apodaca v. Oregon*, 406 U.S. 404 (1972), which allowed convictions through nonunanimous verdicts. But this argument cannot withstand scrutiny. As the State itself acknowledges, this Court should at least reexamine—and likely overrule—a decision when "related principles of law have so far developed as to have left the old rule no more than a remnant of an abandoned doctrine." BIO 3 (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 855 (1992) (plurality opinion); *see also Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989) (overruling is proper when doctrinal changes "have removed or weakened the conceptual underpinnings of the prior decision").

Such is precisely the case here. The *Apodaca* plurality concluded that states could disregard the centuries-old rule requiring unanimous jury verdicts so long as states somehow still respect "the function served by the jury in contemporary society." 406 U.S. at 410. This reasoning is irreconcilable with

this Court's current Sixth Amendment jurisprudence, which, as this Court reaffirmed yet again this June, rigorously enforces the historical understanding of the jury-trial right and the other criminal procedure rules that the Amendment constitutionalizes. *See Giles v. California*, 128 S. Ct. 2678, 2692 (2008) ("It is not the role of courts to extrapolate from the words of the Sixth Amendment to the values behind it, and then to enforce its guarantees only to the extent they serve (in the court's views) those underlying values. The Sixth Amendment seeks fairness indeed—but seeks it through very specific means . . . that were the trial rights of Englishmen."); Pet. for Cert. 8-9. 11-13. Justice Powell concluded that although the Sixth Amendment's jury-trial guarantee requires unanimous verdicts and generally applies to the states, this particular aspect of the guarantee does not bind the states. As the State's silence on the subject indicates, it is impossible to square this "partial incorporation" reasoning with modern case law.

Given that the underpinnings of *Apodaca* have been so severely weakened and that, as the *amicus* filings in this case demonstrate, the practice of allowing convictions through nonunanimous verdicts has such profoundly negative consequences in the criminal justice systems of two states, this Court should not allow the uncertainty concerning the legitimacy of this practice to linger any longer.

CONCLUSION

For the foregoing reasons, as well as those in the petition for certiorari, the petition for writ of certiorari should be granted.

Respectfully submitted,

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